Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. 89-6126 (2)

RAY CHARLES DEGRAFFENREID,

Petitioner

v.

KENNETH D. MCKELLER, WARDEN KCI, WILLIAM D. LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, T. TRAVIS MEDLOCK, ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Ray Charles Degraffenreid, pursuant to Rule 46 of the rules of this Court, and 18 U.S.C.Sec. 3006A (d) (6), asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit without prepayment of costs, and to proceed in forma pauperis. Petitioner was represented by appointed counsel in the District Court and on appeal to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

John T. Hardaway
1405 Gregg Street
Columbia, South Carolina
Counsel for Petitioner

Columbia, South Carolina

December 1, 1989

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AFFIDAVIT OF SERVICE:

The below signed individual, being duly sworn hereby states that, pursuant to Rule 28.3, Rules of the Supreme Court of the United States, on Friday, December 1, 1989, he placed a copy of the attached Petition for Writ of Certiorari in an authorized depository for the United States mail with postage prepaid, addressed as below:

Sally Elliott, Esquire
Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211

He further certifies that all parties required to be served have been served.

John F. Hardaway
Counsel for Petitioner

SWORN to before me the
1st day of December, 1989.

Notary Public for South Carolina L.S.

My Commission Expires: 11-19-1995.

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AFFIDAVIT OF FILING:

Personally appeared before me, John F. Hardaway, who being duly sworn, states as follows:

1. That he is a member of the bar of this Court.

2. That pursuant to Supreme Court Rule 28.2 the original of the attached Petition for Writ of Certiorari was deposited in a United States Post Office or mailbox, with first class postage prepaid, within the time for filing.

3. That the affiant personally mailed the Petition for Certiorari by depositing it at the United States Post Office at Columbia, South Carolina on Friday, December 1, 1989, a date within the permitted time for filing.

John F. Hardaway
1405 Gregg Street
Columbia, South Carolina 29201
Counsel for Petitioner

SWORN to before me the
12 day of December, 1989.

L.S.
Notary Public for South Carolina

My Commission Expires: 11-19-1995

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

JOHN F. HARDAWAY
Attorney at Law

1405 Gregg Street
Columbia, SC 29201
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ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS STANDARDS FOR REVIEWING PETITIONER'S CLAIM THAT THE STATE OF SOUTH CAROLINA USED AN INVOLUNTARY CONFESSION CONFLICT WITH THE STANDARDS APPLIED BY OTHER FEDERAL COURTS OF APPEAL AND EFFECTIVELY UNDERMINES THIS COURT'S DECISION IN MILLER V. FENTON, 474 U.S. 104 (1985).

II. DOES IT VIOLATE THE DUE PROCESS COMPONENT OF THE FIFTH AND FOURTEENTH AMENDMENTS FOR THE STATE OF SOUTH CAROLINA TO USE A CONFESSION AGAINST THE DEFENDANT WHICH WAS OBTAINED BY OVERBEARING AND OUTRAGEOUS POLICE CONDUCT.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Ray Charles Degraffenreid, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit is not published and is reprinted in the Appendix to this Petition at A-1. The order of the United States Court of Appeals for the Fourth Circuit denying petitioner's petition for rehearing and suggestion for rehearing en banc is unreported and is reprinted in the Appendix to this Petition at A-14. The opinion of the District Court for the District of South Carolina is reprinted in the Appendix at A-16. The opinion of United States Magistrate Robert S. Carr is reprinted in the Appendix at A-30.

JURISDICTION

The decision of the Fourth Circuit affirming petitioner's convictions was entered on August 9, 1989. The order of the Fourth Circuit denying petitioner's suggestion for rehearing and

petition for rehearing en banc was entered on October 2, 1989. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1), petitioner having asserted below and asserting herein a deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amend. V:

> No person shall . . . be deprived of life, liberty, or property without due process of law.

United States Constitution, Amend. XIV:

> [N]or shall any State deprive a person of life, liberty, or property, without due process of law . . . .

United States Code, Title 28 sec. 2254(d):

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit-- (1) that the merits of the factual dispute were not resolved in the State court hearing; (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing; (3) that the material facts were not adequately developed at the State court hearing; (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding; (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding; (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or (7) that the applicant was otherwise denied due process of law in the State court proceeding; (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: And in an evidentiary hearing in the proceeding in the Federal court, when due

proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

A. HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The petitioner was indicted for murder, along with a codefendant, during the May 1977 term of the Court of General Sessions for Chester County, South Carolina. His first trial, which began on May 12, 1977, resulted in a mistrial when the jury could not agree on a verdict. The confession at issue was not admitted at that trial. He was retried in November of 1977; was convicted; and was sentenced to life imprisonment. At that trial, the trial judge, while not making specific findings of fact, held the confession voluntary and admitted it.[1] Proper objection was taken to the confession and a factual hearing was held. Petitioner appealed that conviction, including the use of the confession as evidence, to the South Carolina Supreme Court which affirmed the judgment in an unpublished opinion. State v. Degraffenreid, Memo Op. No. 79-10. Subsequently, the petitioner sought post-conviction relief in the state court where he again raised the issue of the involuntariness of the confession. In July of 1981 the petitioner's application for post-conviction relief was denied. That decision was appealed in a timely manner to the South Carolina Supreme Court which affirmed the denial of post-conviction relief pursuant to Rule 23 of the Rules of Practice of the South Carolina Supreme Court. Degrarrenreid v. State, Memo Op. 82-MO-237, filed August 3, 1982.

A pro se petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. sec. 2254 was filed in the district court on December 17, 1985. The respondents answered and moved for summary judgment. The matter was referred to the United States Magistrate pursuant to a local rule for the District of South Carolina. An evidentiary hearing was held before the magistrate. In a Report

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[1] He stated: "I conclude that the statement is admissible in evidence. I find that, from the facts beyond a reasonable doubt, the statement was freely and voluntarily given.

You have just a conflict in the testimony. That's all you've got here. And what I've heard, that's my finding of fact. If I'm wrong, you've got a Court that can correct me. I rule the statements admissible. Thank you."

and Recommendation dated August 5, 1987, the magistrate recommended the petition be granted unless the state retried petitioner within a reasonable period of time without the use of the confession. The respondents seasonably took exception to the Report and Recommendation of the magistrate. By order entered March 4, 1988, the Honorable Joe F. Anderson, Jr. rejected the magistrate's report denied the petition and dismissed the action. Judge Anderson found the confession to have been voluntarily made. On appeal the Fourth Circuit Court of Appeals affirmed the denial of relief finding that the burden was on the petitioner to prove the confession involuntary and that he had failed to meed that burden. On petition for rehearing with suggestion for rehearing en banc the Court of Appeals declined to rehear the matter en banc with a five to four vote.

B. FACTUAL BACKGROUND

On January 29, 1977, Petitioner was charged with a murder which occurred in 1973. Prior to the Petitioner being charged the investigation had been underway since the murder occurred. In August of 1973 the defendant was questioned and denied any participation in the crime. At the request of law enforcement authorities the defendant was given a polygraph in 1973 which was negative for deception.

On January 29, 1977, Smokey Harris gave a statement to the City of Chester, South Carolina, Police Department implicating Ray Charles DeGraffenreid. Harris claimed that he was a lookout in the robbery and murder for which petitioner was tried. Harris was not charged for his involvement. As a result of Harris's statement DeGraffenreid was charged with murder and armed robbery. When initially arrested petitioner denied any involvement in the crime, indicated he understood his rights, signed a waiver of rights form and did not ask for an attorney. After fifteen to twenty minutes of questioning the petitioner was placed in a youth cell which was eight feet wide by twenty feet long with a shower, toilet, table, shelf and one overhead light. One steel door opened to the cell. The only window was an

observation window in the door. There was no television, radio, books or magazines. It was described as dark with limited facilities.

At the request of investigators the county sheriff placed a notice on the wall at the jail indicating that the petitioner was to receive no visitors, have no telephone calls, and was to be kept in the youth cell. This order was understood by the jailer to mean exactly what it said. From January 29, 1977, until the petitioner was taken out of the youth cell sometime after February 4, 1977, he ate all of his meals in the youth cell, showered in the youth cell, and left the youth cell only to be questioned in connection with the charges. He was not allowed visitors or telephone calls and counsel was not appointed for him. At the jail where the petitioner was held bond hearings and initial appearances were commonly held. Regardless of this the petitioner was not taken before a judicial officer from his arrest on January 29, 1977, until after he gave a statement on February 3, 1977. After giving a statement he was immediately taken before the clerk of court and appointed counsel. The first telephone call the petitioner was allowed to make was to his brother George Mayfield on February 4, 1977, after he had given a statement. In that telephone call the petitioner told his brother the police pressured him into making a statement. While petitioner was held incommunicado his brother tried to visit him. The jail would not allow his brother to visit nor would they inform him what petitioner was charged with. George Mayfield, petitioner's brother, visited the petitioner on a regular basis and knew his brother was to be released on January 29, 1977. When petitioner was not released as scheduled Mayfield called the jail on Saturday, January 30, and was told he would need to talk to the Sheriff. On Sunday, he went to the jail during visiting hours, but was not allowed to see his brother. On Monday, he tried to see the Sheriff, but was turned away. On Tuesday, he was advised the Sheriff was in conference. On Wednesday, he called the jail and, on Thursday, he was advised to speak to his

brother's attorney. On Saturday, Mayfield talked to his brother's attorney, and, on Sunday, Mayfield was finally allowed to visit petitioner. Subsequently, Mayfield sold his brother's car and added some of his own money to the funds to hire a private attorney.

The petitioner was born on June 27, 1955, and at the time of the killing for which he was convicted he was seventeen (17) years old. He was twenty-one (21) in 1977 at the time he was interrogated. He was promoted to the tenth grade but dropped out. His work history was limited to manual labor. He testified that in 1977 his reading ability was extremely limited. He has since received a GED from the South Carolina Department of Corrections.

The jail where the petitioner was interrogated consisted of two parts, a stockade for prisoners serving time and a jail for persons awaiting trial or sentencing. In 1977 the petitioner was serving a sentence for purse snatching when he was moved from the stockade to the jail. The petitioner testified that when he was initially moved he was questioned for approximately forty (40) minutes before he was placed in the youth cell. The next day (Sunday) he was questioned for about two hours by an investigator named Willie Heath. On Monday he was interrogated for two hours in the morning then taken to Columbia for a polygraph test. On the return to Chester he was interrogated some more and returned to the youth cell after supper. On Tuesday, three officers questioned the petitioner in the Sheriff's office for approximately two hours. They told petitioner they had a witness against him and that Harris had given a statement. He was returned to the youth cell, and taken out later that afternoon when the same three officers questioned him for two or three hours.

During this period the petitioner was having pain with a hemorrhoid condition which he had developed in 1976. This claim was substantiated by the testimony of his physician. While in the stockade the petitioner had received special meals,

laxatives, and medication, but had not received any of this on the jail side. Eventually, he just quit eating. At one time he asked the jailer for his medications and the jailer indicated he would look into it. Tuesday night Heath came to see the petitioner and questioned him in the Sheriff's office. The petitioner testified he asked Heath and the jailer to move him from the youth cell and they both indicated that they would talk to the Sheriff about moving him. The petitioner indicated that the youth cell was cold, and that he could only sleep fully clothed and using two blankets. Sometime Wednesday night the petitioner overheard a prisoner being given his rights. Accordingly the next day when Heath appeared to question him, he asked Heath for an attorney. The Magistrate found that Heath "was confused as to whether he had seen the petitioner earlier in the morning on February 3, 1977, and could not recall whether the petitioner had asked for an attorney at that time." At the habeas hearing Heath testified that he went to petitioner's cell on the morning of February 3, 1977, but denied petitioner requested counsel. At the trial in 1977 Heath denied that he went to petitioner's cell that morning. At the time of the habeas hearing Heath was using notes that possibly were not available to defense counsel in 1977 when they raised the issue of his request for counsel. The District Judge did not address this contradiction.

That afternoon after he requested counsel Officer Long and Sheriff Orr questioned him in the Sheriff's office. The petitioner was continuing to have pain from his hemorrhoids and he found the office warmer. He did not ask for an attorney again because he had already requested one. After being told repeatedly the gist of Harris's statement petitioner gave the officers an oral confession. He testified he told them what they wanted to hear in order to get an attorney and to get out of the youth cell. He indicated he did not read his statement and no one read it back to him; he simply signed it.

Immediately after giving the statement he was taken to the

Clerk of Court to have an attorney appointed and was moved from the youth cell.

REASONS FOR GRANTING THE PETITION

A. The Confession taken from the defendant was involuntarily made.

This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment. Brown v. Mississippi, 297 U.S. 278 (1936). Generally two rationales have been advanced for holding that certain confessions are obtained in violation of due process. First involuntary confessions are inherently unreliable. A conviction based upon unreliable information is a violation of due process and as such, is a nullity. Brown v. Mississippi, 297 U.S. 278 (1936); Ward v. Texas, 316 U.S. 547 (1942). Second, police techniques themselves are part of the process which is subject to evaluation under the Due Process Clause. Certain police techniques violate the concepts of fundamental fairness which form our ideas of due process. Additionally due process is violated when a confession is not the free and rational choice of the defendant. See Rogers v. Richmond, 365 U.S. 534 (1961).

This Court has clearly recognized the multiple bases for the test of admissibility.

> It is telling that in confession cases coming from the States, this Court has consistently looked to the Due Process Clause of the Fourteenth Amendment to test admissibility. * * * The locus of the right is significant because it reflects the Court's consistently held view that the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to this suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne.

Miller v Fenton, 106 S.Ct. 445 at 453.

The voluntariness of a confession is evaluated under the totality of the circumstances. A determination of voluntariness

"requires careful evaluation of all of the circumstances of the interrogation." Mincy v. Arizona, 437 U.S. 385 (1978) at 401. Police overreaching is a crucial element in making a determination of voluntariness. Colorado v. Connelly, 107 S.Ct. 515 (1986). Examples of overreaching which have been found to invalidate a confession are: defendant subjected to four interrogation while incapacitated and sedated in intensive-care unit, Mincey v. Arizona, 437 U.S. 385 (1978); defendant, on medication, interrogated for over eighteen hours without food or sleep, Greenwald v. Wisconsin, 390 U.S. 519 (1968); sixteen days of incommunicado interrogation in closed cell without windows, limited food and coercive tactics, Davis v. North Carolina, 384 U.S. 737 (1966); defendant held four days with inadequate food and medical attention until confession obtained, Reck v. Pate, 367 U.S. 433 (1961); defendant held for five days of repeated questioning during which police employed coercive tactics, Payne v. Arkansas, 356 U.S. 560 (1958). Other relevant factors are the age of the defendant, Haley v. Ohio, 332 U.S. 596 (1948), his education, Payne v. Arkansas, 356 U.S. 560 (1958), and the advice or lack thereof, to the accused of his constitutional rights. Davis v. North Carolina 384 U.S. 737 (1966). None of these factors can be considered in isolation. United States v. Wertz 625 F.2d 1128 (4th Cir. 1980).

This Court has held that extended periods of incommunicado interrogation are inherently coercive and confessions obtained through such interrogation must be suppressed. Ashcraft v. Tennessee, 322 U.S. 143 (1944); Davis v. North Carolina, 384 U.S. 143 (1966).

The petitioner was clearly held incommunicado. Upon his arrest he was placed in a "youth" cell which was eight feet wide by eighteen to twenty feet long with a shower, toilet, table, shelf and one overhead light. The cell had one steel door with an observation window. There was no television, radio, books or magazines. It was described as dark with limited facilities. Cf. Watts v. Indiana, 338 U.S. 49 (1949). Additionally it is

uncontested that the sheriff placed a notice on the wall of the jail that the petitioner was to have no visitors, no telephone calls, and was to be kept in his cell. The jailor enforced this order as it was written. From January 29, 1977, until February 4, 1977, petitioner ate his meals in his cell, showered in the cell, and left the cell only to be interrogated. Repeated attempts by his brother to either visit with him or learn of his situation were rebuffed. Cf. Darwin v. Connecticut, 391 U.S. 346 (1968). Despite the fact that the petitioner was housed in a jail where bond hearings were held he was not taken before a judicial officer for six days until after he confessed. As the statement of facts demonstrates there can be no doubt that the intention of the police was to hold the petitioner until they had obtained a confession. The confession was vital for their case because they had no evidence other the uncorroborated statement of an informant with whom they had made a deal.

The defendant, a black male, was twenty years old at the time of the interrogation. His work history consisted solely of manual labor. Regardless of the fact that he had reached the tenth grade in school he could only read a little. His personal attributes made him susceptible to coercion. See Moore v. Ballone 658 F.2d 218 (4th Cir. 1981).

During his confinement the petitioner was questioned by a number of different persons over many hours. This type of relay questioning has been condemned by the Supreme Court. Ashcraft v. Tennessee 322 U.S. 143 (1944). Additionally the petitioner testified he requested an attorney and was not allowed to see one prior to being questioned again.

Under the totality of the circumstances both the outrageous conduct of the police and the coercive nature of their conduct violate the Due Process Clause and require that the confession be suppressed.

B. The Fourth Circuit Court of Appeals failed consider the independent significance of the police techniques in finding this confession voluntary.

The Fourth Circuit's majority opinion fails to accord

sufficient consideration to the independent significance of the inquisitorial techniques employed in this case. In this case there is no real dispute about the facts. While the inferences to be drawn from the facts (i.e. whether the confession was voluntary) are disputed, the historical facts themselves (how long the defendant was held, whether or not he was allowed visitors, etc.) are not. Voluntariness is an ultimate question the determination of which by a state court is not binding in a federal habeas proceeding. Davis v. North Carolina, 384 U.S. 737 (1966); Miller v. Fenton, 474 U.S. 104 (1985).

The determination of the admissibility of a confession turns as much on the techniques for extracting the statements, as on whether the defendant's will was overborne. Miller v. Fenton, 474 U.S. 104 (1985). As Judge Phillips stated in his dissent:

> Because the judicial assessment we undertake here is one of judgment - of informed judicial feel - for whether the facts of record reveal that this man's will was probably so overborne that his confession was not "the product of an essentially free and unconstrained choice," Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973), or whether constitutionally suspect inquisitorial techniques were used to extract the confession, there is little more to do in explaining one's judgment on the matter than to lay out the factual premises and announce it.

Degraffenreid v. McKellar et. al., p. 11-12, No. 88-6590 (4th Cir. Aug. 9, 1989).

The reason for the focus on the techniques involved is that certain techniques are so offensive to our system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment. See Brown v. Mississippi, 297 U.S. 278 (1936). Where statements are obtained by physical or psychological torture this Court has repeatedly held that such statements cannot be used to obtain a conviction regardless of the personal characteristics of the defendant. See Mincy v. Arizona, 437 U.S. 385 (1978); Haynes v. Washington, 373 U.S. 503 (1963); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Chambers v. Florida, 309 U.S. 227 (1940).

> Although these decisions framed the legal inquiry in a variety of different ways, usually through the "convenient shorthand" of asking whether the confession was "involuntary," * * *, the Court's analysis has

> consistently been animated by the view that "ours is an accusatorial and not an inquisitorial system," * * * , and that, accordingly, tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness.

Miller v. Fenton, 106 S.Ct. 445, 449 (1985).

As the facts set forth earlier indicate, the only inference reasonably to be drawn from the behavior of the police is that the defendant was going to be held in solitary confinement until he gave a confession. It is undisputed that as soon as he gave a confession he was released from solitary confinement and was appointed counsel. The conduct of the police was (quoting Judge Phillips) "palpably sinister". It is the type of conduct which this court has disapproved since its first decisions on confessions. Because the outrageous police conduct rendered the confession constitutionally involuntary the petitioner should be granted relief.

C. The Court of Appeals incorrectly allocated the burden of proof.

This habeas case was referred to a federal magistrate in accordance with a local rule of the District of South Carolina. The magistrate, in his report and recommendation, recommended that the writ issue holding "[a]ccordingly, finding less than a preponderance of evidence to support a finding of voluntariness, and the existence of facts which would require exclusion of the evidence, it is recommended that the petitioner's petition for habeas corpus relief be granted". The District Court overruled this recommendation stating that the "magistrate's recommendation is premised upon an incorrect application of the burden of proof in habeas corpus cases" and holding "this court has examined the record in an effort to determine whether the sum of the circumstances compels a finding of involuntariness. The court has concluded that involuntariness has not been shown." The Court of Appeals held that the petitioner in a habeas proceeding bears the burden of establishing by a preponderance of the evidence that the confession was involuntary and found that the defendant did not meet the burden.

Under 28 U.S.C. 2254(d) a state court factual finding is entitled to a presumption of correctness in a federal habeas corpus proceeding unless one of eight exceptions applies. See Townsend v. Sain, 372 U.S. 293 (1963). Thus as to certain factual issues the burden of proof can be placed on habeas petitioners to establish a substantial constitutional deprivation. This burden of proof derives from the presumption and deference given state court findings of fact. See Johnson v. Zerbst, 304 U.S. 458 (1938) (burden of proof rests on defendant to establish he did not competently and intelligently waive his constitutional right to assistance of counsel); Clayton v. Haynes, 517 F.2d 577 (4th Cir. 1975)(habeas petitioner has burden of showing invalidity of prior convictions used to impeach).

This rule however applies to factual issues only, not to questions of law or mixed questions of law and fact. A state court finding of voluntariness requires an independent federal determination of that issue, Miller v. Fenton, 106 S.Ct. 445 (1985), as noted by the district court in this case. Such review is plenary, Ahmad v. Redman, 782 F.2d 409 (3rd Cir. 1986), and requires the reviewing court to make an independent determination as to voluntariness. Woods v. Clusen, 794 F.2d 293 (7th Cir. 1986). This policy of independent review has served to prevent the states form frustrating federal rights through distorted fact-finding. Haynes v. Washington, 373 U.S. 503, 515-516 (1963); Stein v. New York, 346 U.S. 156, 181 (1953).

While historical facts are to be given a presumption of correctness the voluntariness of a confession is not a factual issue. Miller v. Fenton 106 S.Ct. 445 (1985); Haynes v. Washington, 373 U.S. 503 (1963); Mincy v. Arizona, 437 U.S. 385 (1978). Subsidiary factual questions (the length of interrogation, defendant's prior experience with the legal process etc.-see Miller v. Fenton 106 S.Ct. 445 (1985) at 453) are entitled to a presumption of correctness. State court findings on such subsidiary facts are conclusive on the habeas

court if fairly supported in the record and if the other circumstances enumerated in 28 U.S.C. 2254(d) are inapplicable. Once the underlying factual determinations have been made however, the federal habeas court still must make an independent determination of voluntariness.

Whether or not a confession is voluntary is to be determined from the totality of all the surrounding circumstances, both the characteristics of the accused and the details of interrogation. Schneckloth v. Bustamonte, 412 U.S. 218 (1972). The burden of proof is on the state at the trial level to prove voluntariness by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477 (1972).

Miller v. Fenton, makes clear that "the ultimate question, whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination." 106 S.Ct. 445 at 451. Independent determination cannot be given the question by the federal courts where a different burden of proof is used for evaluation. By establishing a different burden of proof the Court of Appeals has created a different question.

The burden of proof, as a matter of logic, can only apply to factual issues. In this case there is no dispute about the facts. The only issue is the ultimate issue of voluntariness. That is, in this case, what view should be taken of the police conduct. By holding that an application of the burden of proof can defeat the claim the court of appeals has converted a legal issue into a factual issue undermining this Court's rule in Miller v. Fenton. Because the burden of proof derives from the presumption accorded state factual findings it has no place in the independent determination of voluntariness required in federal review.

By ruling as it has, the Fourth Circuit has accorded deference to a state court on a mixed question of fact and law (or purely legal question). It has thus placed itself in

opposition to other circuits which hold no deference is due on such issues. See Chizen v. Hunter, 809 F.2d 560 (9th Cir. 1986) (voluntariness of a guilty plea is a question of law not subject to deferential review); Glidewell v. Burden, 822 F.2d 1027 (11th Cir.) cert. denied 108 S.Ct. 727 (1986) (in determining whether speedy trial violation occurred federal courts must defer to historical facts but make independent legal determination of whether violation in fact occurred); Iaea v. Sunn, 800 F.2d 861 (9th Cir. 1986) (voluntariness of guilty plea is question of law not subject to deferential review). This court should grant review to resolve the conflict between the circuits, prevent confusion and insure the proper administration of justice in the state courts.

CONCLUSION

The questions presented in this case are important not only to petitioner but also to the administration of the criminal justice system in the federal and state courts. Therefore, for the reasons stated in this petition, certiorari should be granted in this case to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

December 1, 1989

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-6590

RAY CHARLES DEGRAFFENREID

Petitioner - Appellant

v.

KENNETH D. MCKELLAR, Warden, RCI;
WILLIAM D. LEEKE, Commissioner, SCDC;
T. TRAVIS MEDLOCK, Attorney General for
the State of South Carolina

Respondents - Appellees

Appeal from the United States District Court for the District of South Carolina, at Columbia. Joe F. Anderson, Jr., District Judge. (CA-3:85-3417)

Argued: March 9, 1989 Decided: August 9, 1989

Before WIDENER, PHILLIPS, and WILKINS, Circuit Judges.

John Frank Hardaway for Appellant. Salley Wood Elliott, Assistant Attorney General (T. Travis Medlock, Attorney General; Donald J. Zelenka, Chief Deputy Attorney General on brief) for Appellees.

WILKINS, Circuit Judge:

Ray Charles Degraffenreid, a South Carolina inmate, appeals from the denial of his petition for a writ of habeas corpus. 28 U.S.C.A. § 2254 (West 1977). We affirm.

I.

Degraffenreid is serving a life sentence on his conviction for the murder of Claude Killian who was fatally shot on August 5, 1973. Although Degraffenreid was questioned regarding his involvement in the murder shortly after the shooting and undervent a polygraph examination, he was not charged at that time. The investigation continued until January 1977 when an informant implicated Degraffenreid in the crime.

Degraffenreid was arrested for murder on January 29, 1977 while incarcerated on an unrelated charge. Five days after the arrest, on February 3, he confessed. He was subsequently indicted for murder by a grand jury and his first trial was held in May 1977 during which the confession was suppressed as involuntary. When the jury was unable to reach a verdict, the trial judge declared a mistrial. On retrial in November, a different trial judge who was assigned to that term of court admitted the confession. Degraffenreid was convicted and the conviction was affirmed on appeal by the South Carolina Supreme Court. State v. Degraffenreid, No. 79-10 (S.C. Jan. 15, 1979) (mem.).

Degraffenreid subsequently filed this habeas action asserting that the conviction was obtained with an involuntary

confession. After appointment of counsel and an evidentiary hearing, the magistrate reported his proposed finding that Degraffenreid's confession was involuntary and recommended that a writ be issued. On de novo review, the district judge, in a well-reasoned opinion, found that Degraffenreid had not shown that his confession was involuntary and denied the petition. On appeal, Degraffenreid contends that the district court erred in placing the burden on him to prove the involuntariness of his confession and in concluding that he did not meet that burden.

II.

State law enforcement investigation techniques, including interrogation, are governed at a minimum by the due process requirements of the fourteenth amendment. Colorado v. Connelly, 479 U.S. 157, 163 (1986). While police tactics which offend civilized notions of justice are strongly condemned, Id., police questioning is a legitimate tool for effective criminal law enforcement. Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973). The due process clause does not prohibit police officers from questioning a suspect under all circumstances. Id.

The ultimate due process test for confessions is one of voluntariness: "Is the confession the product of an essentially free and unconstrained choice by its maker?" Id. A confession violates due process and must be suppressed only if it was obtained by tactics which overbore a suspect's will and critically impaired his capacity for self-determination. Id. at 225-26. Whether a confession is voluntary must be determined from an examination of "the totality of all the surrounding

circumstances--both the characteristics of the accused and the details of the interrogation." Id. at 226.

The characteristics of the suspect which should be considered include the age, education and intelligence of the suspect. Id. The setting and details surrounding the taking of the confession should also be considered, such as the length and conditions of detention and the frequency and duration of the questioning. Id.; United States v. Wertz, 625 F.2d 1128, 1134 (4th Cir.), cert. denied, 449 U.S. 904 (1980). The administration of Miranda[1] warnings is also a significant factor. Schneckloth, 412 U.S. at 226; Davis v. North Carolina, 384 U.S. 737, 740 (1966). And while heavy weight must also be given to the use of physical mistreatment, Reck v. Pate, 367 U.S. 433, 440 (1961), the use of psychological pressure may also render a confession involuntary, Ferguson v. Boyd, 566 F.2d 873, 877 (4th Cir. 1977) (quoting Blackburn v. Alabama, 361 U.S. 199, 206 (1960)). Ultimately, "none of these various factors is to be considered in isolation, nor may the determination [of voluntariness] rest solely upon any one circumstance." Wertz, 625 F.2d at 1134. Determination of voluntariness does not turn "on the presence or absence of a single controlling criterion." Schneckloth, 412 U.S. at 226. All the surrounding circumstances must be carefully scrutinized. Id.

When a confession is challenged at trial, the prosecution bears the burden of proving by a preponderance of the evidence that the confession was voluntary. Lego v. Twomey, 404

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

U.S. 477, 489 (1972). On collateral review of a state conviction, the voluntariness of a confession is "a legal question requiring independent federal determination." Miller v. Fenton, 474 U.S. 104, 110 (1985). However, while federal habeas review of the ultimate question of voluntariness is plenary, subsidiary factual questions are presumed correct pursuant to section 2254(d), and federal courts "should ... give great weight to the considered conclusions of a coequal state judiciary." Id. at 112. On petition for a writ of habeas corpus, the petitioner bears the burden of establishing by a preponderance of the evidence that the confession was involuntary. Miller v. Fenton, 796 F.2d 598, 604 (3d Cir.) (on remand from 474 U.S. 104), cert. denied, 479 U.S. 989 (1986). We find that Degraffenreid did not meet his burden of establishing that his confinement, the nature of the questioning, or his personal characteristics--or any combination of these factors--rendered his confession involuntary.

A.

A review of the record demonstrates that the conditions of Degraffenreid's confinement during his detention were not such as to overbear his will or impair his capacity for self-determination.

On January 29, 1977 Degraffenreid was incarcerated at the Chester County Law Enforcement Center serving a sentence unrelated to the murder. Upon his arrest for murder, he was moved from the stockade side of the facility to the jail side and placed in a single juvenile cell. Although Degraffenreid was not

a juvenile, he was placed there to isolate him from the informant who was housed in the same facility. Although a notice was posted ordering that he was to have no visitors or telephone calls, law enforcement officers testified without contradiction that attorneys and clergymen were not considered "visitors" within this notice. And although Degraffenreid's brother testified that he attempted to visit him on several occasions during this period, the detention facility officials denied that these attempts were made.

Degraffenreid remained in this cell for the next five days except when being questioned or transported for investigative purposes. The cell measured 15 feet by eight feet and contained a bed, commode, sink, shower, table, and stool, and had a window in the door. The detention facility officials did acknowledge that Degraffenreid had complained that the cell was cold and requested to be moved. They explained that all the thermostats were set at 65 degrees to conserve energy, but to compensate each inmate was issued two blankets.

Although Degraffenreid occasionally refused to eat some of his meals, he was offered three meals a day. He alleged that he could not eat at times because of a problem with hemorrhoids. And while he further contended that he was denied medical assistance for this condition, the officials denied that he had made any such request. In any event, Degraffenreid fails to demonstrate that the alleged denial of medical care for his hemorrhoids would constitute an infliction of physical punishment equivalent to unconstitutional physical coercion.

Further, the questioning by law enforcement officials which preceded Degraffenreid's confession was not abusive or overbearing. The questioning was not relentless or incessant and Degraffenreid was advised of and waived his rights on several occasions. And by his own admission, no violence or threats of violence of any kind or to any degree were made by any official.

Immediately upon his arrest, Degraffenreid was fully advised of his rights which he acknowledged and waived in writing. At that time, he was questioned by Chester County Sheriff Orr and city police Detective Heath for less than an hour.

On January 30 Degraffenreid was questioned for approximately two hours by Detective Heath. He denied his guilt and requested that Heath investigate his alibi claim. Heath responded to this request and did, in fact, question Degraffenreid's alibi witness who did not confirm his story or provide any basis for an alibi defense.

On Monday morning, January 31, Degraffenreid was questioned for approximately two hours by Detective Heath. During this session, he consented to a polygraph test. That afternoon he was transported to the South Carolina State Law Enforcement Division (SLED) headquarters where the test was conducted. At that time, he was again advised of his rights and signed another waiver. Upon his return to Chester, he was questioned by Detective Heath, along with Captain Connor and Chief Straight for approximately three hours.

He was again questioned on Tuesday, February 1 and Wednesday, February 2 for several hours both in the morning and the afternoon. Although Degraffenreid admits that through Wednesday afternoon, he had not requested counsel, he contends that he asked Heath for an attorney on Thursday morning. When Degraffenreid was questioned at trial regarding why he waited until that time to request an attorney, he testified that he had finally realized he needed an attorney because the officials were not believing his story and he needed medical attention. In contrast, at the federal habeas proceeding, Degraffenreid testified that the request was prompted by hearing another detainee being advised of his rights on Wednesday night. Heath denied, at both the trial and the habeas proceeding, that such a request was made.

Degraffenreid confessed on Thursday afternoon while being questioned for the first time by SLED agent Reid Long. Prior to questioning, Degraffenreid was advised once more of his rights and signed a waiver.

Subsequent to the confession, Degraffenreid was taken before the Clerk of Court for appointment of counsel, even though as the law enforcement officers asserted, he had still not asked for an attorney. Also, the isolation was lifted and he was transferred to an adult maximum security cell.

C.

Finally, Degraffenreid was not an uneducated youth dealing with law enforcement for the first time. He was a 21-year-old adult with a tenth grade education and an extensive criminal record. Moreover, since Degraffenreid was arrested on the murder charge while he was already incarcerated, the psychological impact of being arrested was no doubt lesser than had he been a free man who suddenly lost his liberty.

III.

The delay in taking Degraffenreid before a judicial officer should not be sanctioned as ideal procedure. However, as this court has stated previously, "'the voluntariness of a confession cannot be equated to the absolute absence of intimidation,'" Wertz, 625 F.2d at 1134 (quoting Johnson v. Hall, 605 F.2d 577, 582 n.8 (1st Cir. 1979)). Close scrutiny of the record does not establish by a preponderance of the evidence that the circumstances surrounding the confession were sufficiently egregious to cause Degraffenreid's will to be overborne or his capacity for self-determination to be critically impaired.

AFFIRMED.

PHILLIPS, Circuit Judge, dissenting:

As the majority points out, on collateral review of a state conviction, the voluntariness of a confession is "a legal question requiring independent federal determination." Miller v. Fenton, 474 U.S. 104, 110 (1985). And the majority also rightly notes that a critical element of this legal inquiry is whether the suspect's will has been so overborne that his confession is not in that sense "voluntary." Slip op. at 3. What the majority (and the district court) have not sufficiently (or perhaps at all) taken into account, however, is that there is another element to the voluntariness question, namely, "whether the techniques for extracting the [confession], as applied to this suspect, are compatible with a system that presumes innocence and assumes that a conviction will not be secured by inquisitorial means." Id. at 116. As the Miller Court emphasized, "the admissibility of a confession turns as much on [this element] as on whether the defendant's will was in fact overborne." Id. (noting "hybrid quality of the voluntariness inquiry").

With all respect, I think the majority's determination of voluntariness is traceable precisely to its failure to consider the independent significance of the inquisitorial techniques employed in this case.

The first independent federal determination of voluntariness made in this case did not fail to appreciate the significance of that element. This was the determination made by Magistrate Carr of the United States District Court for the

District of South Carolina on reference from the chief judge of that district. On the basis of a thorough evidentiary hearing at which he heard the live testimony of DeGraffenreid and the local and state officials who were most directly involved in the confinement and interrogation leading to DeGraffenreid's confession, the magistrate concluded in a carefully reasoned opinion that the confession was involuntary in the constitutional sense. While that conclusion could only be expressed in the form of a recommendation which was then rejected on de novo review by the district judge, I think the magistrate had it right, and my independent determination accords with his rather than with that of the district judge and the majority reviewing the matter again de novo on this appeal.

Because the judicial assessment we undertake here is one of judgment - of informed judicial feel - for whether the facts of record[1] reveal that this man's will was probably so overborne that his confession was not "the product of an essentially free and unconstrained choice," Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973), or whether constitutionally suspect inquisitorial techniques were used to extract the confession, there is little

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[1] So far as the record reveals, Magistrate Carr did not fail to give to any state court findings on subsidiary factual questions the deference due them in the course of his plenary review of the ultimate question. See Miller v. Fenton, 474 U.S. at 117. Nor, in turn, did the district judge, in the course of rejecting the magistrate's ultimate determination of involuntariness, reject any of the magistrate's subsidiary findings on the critical points of location, duration, warnings, treatment, etc. In effect, there is then no real dispute as to the factual circumstances.

more to do in explaining one's judgment on the matter than to lay out the factual premises and announce it. If I had to explain it further, I could not do better than did Magistrate Carr in summarizing his assessment. After taking into account all of the factors upon which the majority here relies - that DeGraffenreid was not physically brutalized, nor deprived of food or drink or essential medical needs, nor subjected to any overt psychological ploys - Magistrate Carr nevertheless concluded that he was overborne in will and impaired in his capacity for essentially free choice by the totality of the circumstances to which he was subjected by the local and state officials, and that the techniques employed by state and local officials were indeed constitutionally impermissible ones.

> The petitioner was held incommunicado for three (3) to five (5) days in solitary confinement. He had no exercise, no visitors, no telephone calls. He ate, slept, bathed, and existed within this one cell. There were no magazines, radios, television, books or other diversions. The only window was an observation window in the cell door which when opened revealed the hall and the door to the sheriff's office. The only time the petitioner was taken out of this reportedly cold cell was for questioning.
>
> The only safeguard taken to protect the petitioner's rights was the giving of Miranda warnings. Despite the presence of judicial officers on the grounds of the facility and procedures for transporting prisoners to other court officials, the petitioner was not taken before a judicial officer, was not appointed an attorney and was not given any conditions of release until after he confessed.
>
> . . . .
>
> Here, . . . the totality of the circumstances, including but not limited to the repeated advice of rights, the length of the incommunicado questioning, the intentional imposition of solitary conditions of confinement, the

> delay in taking the petitioner before a judicial officer and the conduct of law enforcement authorities immediately after obtaining the petitioner's confession supports the conclusion that the confession was not the product of a free and deliberate choice rather than intimidation, coercion or deception. [Citations omitted.] Indeed the inference is that despite the advice of rights, the only way the petitioner was going to be released from solitary confinement and allowed contact with third parties was to give a confession. The undisputed facts are that as soon as he gave a confession he was released from solitary confinement and given counsel.

Because I share this persuasive assessment[2] of the nature and probable consequence of the palpably sinister - and ultimately successful - course of prolonged incommunicado confinement and interrogation, I dissent and would reverse and direct conditional grant of the writ.[3]

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[2] An assessment whose persuasiveness is bolstered by the fact that it was also made (though possibly on different grounds and reasoning) by the first state trial judge who considered the confession's voluntariness. Out of all the judges who have considered the voluntariness of this confession, only three have done so on the basis of evidentiary hearings; of those three, two have found it involuntary.

[3] Also with the magistrate, I would hold that the error of admitting this confession could not conceivably be considered harmless beyond a reasonable doubt. The hung jury in the first trial conducted without the confession amply demonstrates that.

CORRECTED ORDER

FILED

OCT 3 1989

U.S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 88-6590

Ray Charles Degraffenreid

Petitioner - Appellant

versus

Kenneth D. McKellar, Warden, RCI;
William D. Leeke, Commissioner, SCDC;
T. Travis Medlock, Attorney General for
the State of South Carolina

Respondents - Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court.

On the question of rehearing before the panel, Judge Phillips voted to rehear the case. Judge Widener and Judge Wilkins voted to deny.

In a requested poll of the Court on the suggestion for rehearing in banc, Judges Ervin, Winter, Phillips, Murnaghan and Sprouse voted to rehear the case in banc; and Judges Russell, Widener, Hall, Chapman, Wilkinson and Wilkins voted against in banc rehearing.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges voted to deny rehearing in banc,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkins.

For the Court,

JOHN M. GREACEN,

CLERK

MICROFILMED
FILED
MAR 4 1988
ANN A. BIRCH, CLERK
COLUMBIA, S. C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

ENTERED
3-4-88

Ray Charlen Degraffenreid, Petitioner, vs. Kenneth D. McKeller, et al., Respondents.	C/A No. 3:85-3417-17J ORDER

This matter is before the court for review of the Magistrate's Report made in accordance with 28 U.S.C. § 636(b)(1)(B) and Local Rule 19.02, DSC.

The magistrate makes only a recommendation to this court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the court. Mathews v. Weber, 423 U.S. 261 (1976). The court is charged with making a de novo determination of those portions of the Report and Recommendation to which specific objection is made, and the court may accept, reject or modify, in whole or in part, the recommendation of the magistrate, or recommit the matter to him with instructions. 28 U.S.C. § 636(b)(1).

The petitioner was indicted for murder during the May 1977 term of the Court of General Sessions for Chester County, South Carolina. His first trial, which began on May 12, 1977, resulted in a mistrial when the jury could not agree on a verdict. He was again tried in November of 1977; was convicted; and was

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sentenced to life imprisonment. Significantly, the confession which is at issue in this proceeding was excluded by the presiding judge at the first trial, but was admitted into evidence by a different presiding judge at the second trial.

After a direct appeal and state post-conviction relief proceedings, both of which were unsuccessful, the petitioner filed this action raising the following issues:

(1) The petitioner's conviction was obtained by the use of a coerced confession; and

(2) The petitioner was denied effective assistance of counsel.

The matter was referred to the United States Magistrate, pursuant to the local rule of this court dated May 9, 1977, which was then in force. The magistrate conducted a hearing and thereafter recommended that the district court grant the writ unless the state granted the petitioner a new trial within a reasonable length of time. Alternatively, because of the inadequacy of the record before him, the magistrate suggested that he be allowed to conduct a more complete evidentiary hearing. See magistrate's Report and Recommendation dated September 10, 1986. The district court accepted the second of these two recommendations, and by order dated October 22, 1986, directed the case be remanded for a plenary evidentiary hearing and the preparation of a Supplemental Report and Recommendation thereon.

The magistrate thereafter conducted an additional hearing, and considered the testimony of nine witnesses. In a

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second Report and Recommendation dated August 5, 1987, the magistrate recommended the petition be granted unless the state retried petitioner within a reasonable period of time.

The respondent seasonably took exception to the Report and Recommendation, and oral argument was heard by this court on January 28, 1988. In addition to considering the arguments advanced orally and in the parties' briefs, the court has carefully and extensively reviewed the transcript of the testimony produced before the magistrate as well as the photographs, the medical records, the signed confession, and other documentary evidence received by the magistrate.

The magistrate found that the petitioner was properly given the now familiar warnings required by Miranda v. Arizona, 384 U.S. 436 (1966). Petitioner has failed to object to this portion of the Report and, accordingly, the court accepts the findings and recommendation of the magistrate insofar as it relates to the contention that petitioner's confession was obtained in violation of Miranda.

The magistrate's determination that the petition for habeas corpus should be granted is grounded upon his finding that petitioner's confession was not voluntary. Because the court concludes that the magistrate's recommendation is premised upon an incorrect application of the burden of proof in habeas corpus cases, and because the court's review of the evidence leads it to a finding contrary to that of the magistrate, the Report and Recommendation of the magistrate is rejected, the petition for

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habeas corpus should be denied and this action should be dismissed.

The petitioner alleges that he was taken into custody, held incommunicado, questioned, administered a lie detector test, and as a result involuntarily confessed to the murder of Claude T. Killian, an elderly gentleman who was robbed and then shot at a Chester County launderette.

The testimony presented to the magistrate revealed the following: In January of 1977, petitioner was serving time in the Chester County stockade for grand larceny. He was to complete the service of this sentence on February 5.1/ Shortly before his sentence was completed, City of Chester officials became aware of information that might implicate the petitioner in the unsolved Killian murder, which had occurred in 1973.

Acting primarily upon information provided by one Smokey Harris, the police obtained an arrest warrant and formally "arrested" petitioner on January 29, 1977. Degraffenreid was advised of his rights, denied any involvement in the robbery and murder, indicated he understood his rights, and did not ask for an attorney. He signed a waiver of rights form. After fifteen to twenty minutes of questioning, he was returned to jail. He was, however, transferred from the stockade side of the law enforcement complex to a juvenile cell. The testimony at the

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1/Although petitioner's term of incarceration was to expire on February 5, the testimony before the magistrate indicated that it was the "practice" of the county to release all prisoners on the first day of each month.

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hearing demonstrated that petitioner's removal to another location within the complex was designed to avoid contact or communication between petitioner and Harris, his accuser, who was also serving time on the stockade side.

The stockade side of the complex was somewhat akin to a dormitory, where inmates were allowed relative freedom of movement, the ability to intermix with other inmates, and a locker in which to store personal items. The juvenile cell, on the other hand, was a room designed to hold a single inmate, with a stool, bench, bed, shower, sink and toilet. The only opening to the outside was an observation window in the door. Photographs of the juvenile cell were introduced at the hearing and examined by this court.

Degraffenreid was removed from the juvenile cell on Monday, January 31 and taken to SLED headquarters in Columbia where, with his consent and after being again advised of his rights, he was administered a polygraph examination. The petitioner's answers to some of the questions indicated deception. Degraffenreid was returned to the juvenile cell and was thereafter removed from the cell only for purposes of additional questioning.

Petitioner confessed to the Killian murder on Thursday, February 3. Between the time of his "arrest" and his confession, he was questioned four or five times by city and/or county officials. Each time, he was fully advised of his rights and at no time was he coerced, threatened, or intimidated. Petitioner

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made no request for an attorney, medication, visitors, telephone calls, or any change in the conditions of his confinement.. He did request that Officer Heath check out several alibi witnesses, and Heath responded as requested. The alibi witnesses, when contacted by Heath, did not substantiate petitioner's alibi contentions.

Shortly after petitioner was moved to the juvenile cell, Sheriff Orr had a sign placed in the jailer's office indicating that the petitioner was to receive no visitors or phone calls. Although it was Orr's intention to leave the sign up only through the weekend, it was inadvertently left up the next week.

The petitioner was estranged from most of his family and never requested to see any family member. His brother, George Mayfield attempted to see the petitioner to determine why he had not been released on February 1, but was turned away, presumably because of the sign which had been posted.

The testimony is in sharp conflict as to whether Degraffenreid requested medication for a hemorrhoid condition he was experiencing. Petitioner contends he requested the medication, that he was told the jailers would "look into it", and that he never received the medication. The state's witnesses all indicated that petitioner's first request for medication was made on February 11, well after he confessed to the murder.

At the time of his confession, Degraffenreid was twenty one years old and already had an extensive record. He had been

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convicted of armed robbery, grand larceny, housebreaking and receiving stolen goods. Each time, he had confessed, given a statement, and pled guilty.

The petitioner contends, and the magistrate found, that the incommunicado questioning, the conditions of "solitary confinement", the lack of medication, and the conduct of law enforcement authorities after the confession[2]/all compel the conclusion that petitioner's confession was not voluntary.

The voluntariness of a confession is not an issue of fact entitled to a presumption of correctness under 28 U.S.C. § 2254(d), but is a legal question meriting independent consideration in a federal habeas corpus proceeding. Miller v. Fenton, 474 U.S. 104 (1985). A confession is involuntary and subject to suppression

> when induced by such duress or coercion, express or implied, that the accused's 'will has been overborne and his capacity for self-determination critically impaired,' Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973) and his statement was not 'the product of a rational intellect and a free will.' Mincey v. Arizona, 437 U.S. 385, 398 (1978).

United States v. Wertz, 625 F.2d 1128, 1133 (4th Cir. 1980).

In determining whether a defendant's will has been overborne, this court must examine "the totality of all the surrounding circumstances - both the characteristics of the

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[2]/After the confession, Degraffenreid was taken before the Clerk of Court, who appointed an attorney to represent him.

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accused and the details of the interrogation." Schneckloth v. Bustamonte, 412 U.S. at 226. Among the relevant factors, addressed by other courts examining this issue which have potential application here, there are included: the age of the accused, Haley v. Ohio, 332 U.S. 596 (1948); his education, Payne v. Arkansas, 356 U.S. 560 (1958), the advice, or lack thereof, to the accused of his constitutional rights, Davis v. North Carolina, 384 U.S. 737 (1966), the length of detention, Chambers v. Florida, 309 U.S. 227 (1940), the repeated and prolonged nature of the questioning, Ashcraft v. Tennessee, 322 U.S. 143 (1944), and the deprivation of food or sleep, Reck v. Pate, 367 U.S. 433 (1961).

The Fourth Circuit has admonished that "none of these various factors is to be considered in isolation, nor may the determination [of voluntariness] rest solely upon any one circumstance." United States v. Wertz, 625 F.2d at 1134. Finally, "the voluntariness of a confession cannot be equated to the absolute absence of intimidation", Johnson v. Hall, 605 F.2d 577, 582 (1st Cir. 1979), for "under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind." United States v. Wertz, 625 F.2d at 1134, quoting Schneckloth v. Bustamonte, 412 U.S. at 224.

In considering the Report of the magistrate, who conscientiously and thoroughly inquired into the facts of the case, it should be noted as an initial matter that he improperly,

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in the court's view, placed the burden of showing voluntariness on the state. While in a pre-trial motion to suppress, and on a direct appeal from a conviction, a heavy burden of showing that the confession was voluntary is on the prosecution, United States v. Sledge, 546 F.2d 1120 (4th Cir.), cert. denied, 430 U.S. 910 (1977), in a habeas corpus action, the burden of showing a lack of voluntariness rests with the petitioner. Martin v. Wainwright, 770 F.2d 918, 925 (11th Cir. 1985); Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980); Bruce v. Estelle, 536 F.2d 1051 (5th Cir. 1976), cert. denied, 429 U.S. 1053 (1977). See also Clayton v. Haynes, 517 F.2d 577, 578 (4th Cir. 1975) ("the burden of showing a substantial constitutional deprivation is upon the petitioner in a habeas corpus proceeding"); Graham v. Maryland, 454 F. Supp. 643, 650 (D. Md. 1978) ("the habeas corpus applicant bears the burden of proving his constitutional claim"). That the magistrate placed the burden on the wrong party is made clear by his September 10, 1986 Report ("...the burden of showing a voluntary confession is on the state and it has not met that burden"), his August 5, 1987 Report ("The state...has the burden of showing voluntariness") and by the fact that he required the state to put up its case first at the evidentiary hearing he conducted.

It is in this context, therefore, that this court has examined the record in an effort to determine whether the sum of the circumstances compels a finding of involuntariness. The court has concluded that involuntariness has not been shown.

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At the outset, it is significant to note that when the petitioner was "arrested" for the Killian murder, he was already incarcerated for grand larceny, and his sentence did not expire until after the date on which he confessed. Admittedly, his arrest caused him to be transferred to another portion of the jail, with more spartan conditions. However, Degraffenreid never complained about his conditions.

Of equal significance is the fact that Degraffenreid was "street wise", having already been convicted of several major crimes. He had previously given confessions and had been represented by court appointed counsel. He was "no stranger to criminal activity", United States v. Wertz, 625 F.2d at 1135, nor was he "inexperienced in the ways of crime detection nor...dumb as to [his] rights." Stein v. New York, 346 U.S. 156, 187 (1953).

The record reveals that the questioning process was not overbearing or oppressive. There was no threat of physical harm to the petitioner or promise of reward or immunity in exchange for a confession. Petitioner was questioned sporadically and not at great length. He was not questioned into the night or the early morning hours, see Ashcraft v. Tennessee, 322 U.S. 143 (1944), nor was he questioned by "relay" teams of law enforcement officers, see Watts v. Indiana, 338 U.S. 49 (1949). He was advised of his rights each time he was questioned, and he readily waived his right to counsel and sought to cooperate with his interrogators and establish an alibi defense. Petitioner

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complains that he was denied his medication for hemorrhoids, but this testimony is rendered less credible when considered in light of the undisputed testimony that Officer Heath, at petitioner's request, sought out alibi witnesses in an effort to assist the petitioner. There is no indication that Officer Heath would not have likewise obtained petitioner's medication.

A review of Degraffenreid's testimony reveals that, throughout much of his testimony, he is articulate and possessed of great recall regarding the events leading up to his confession. However, when the question was put to him concerning his reasons for admitting guilt on February 3, his testimony breaks down. Transcript of February 19, 1987 hearing, pp. 206-208. While it is often difficult to make credibility determinations from a printed record, Degraffenreid's testimony on this crucial question is in sharp contrast to the remainder of his testimony. Any subsequent account by an accused of his prior subjective mental impressions and reactions which is always influenced by self interest, is to be carefully scrutinized. United States v. Robertson, 582 F.2d 1356 (5th Cir. en banc 1978).

It is unfortunate that the sign, indicating no visitors or phone calls would be permitted the petitioner, was posted and remained in the jailer's office. However, the uncontradicted testimony is that established jail procedure would have still allowed a visit by an attorney or a minister, but petitioner requested no such visits and affirmatively indicated that he did not wish to see an attorney.

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The fact that petitioner's brother sought, and was refused, permission to visit him is of no moment. Events occurring outside of a suspect's presence and entirely unknown to him can have no bearing on his capacity to comprehend and knowingly relinquish a constitutional right. Moran v. Burbine, 475 U.S. 412 (1986).

After carefully scrutinizing the entire record, the court has concluded that Degraffenreid's confession was the product of his independent, informed choice to cooperate with the law enforcement officers. He possessed the capability to do so and his will was not overborne by the conditions of his confinement nor the methods used to interrogate him.

At oral argument, counsel for the petitioner indicated that the effective assistance of counsel issue is subsumed within the voluntariness issue. That is to say, the only complaint against petitioner's trial counsel is that he was not successful in having the confession suppressed. Because the court has determined that the confession was voluntary and thus properly admitted, there is no need to address the effective assistance of counsel question.

After reviewing the record and the applicable law, the court finds that the petition states no valid claim for relief under 28 U.S.C. § 2254. Accordingly, IT IS HEREBY ORDERED that the petition is denied and this action is dismissed.

IT IS SO ORDERED.

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Joe F. Anderson, Jr.
United States District Judge

Greenville, South Carolina

March 2, 1988

A TRUE COPY
Attest: Ann A. Birch, Clerk
By Linda W. Winchard
Deputy Clerk

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FILED
AUG 07 1987
ANN A. BIRCH, CLERK
COLUMBIA, S. C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

RAY CHARLES DEGRAFFENREID, Petitioner, -versus- KENNETH D. McKELLAR, WARDEN T. TRAVIS MEDLOCK, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA, WILLIAM D. LEEKE, COMMISSIONER, SCDC, Respondents.	)	Civil Action No 85-3417-6J REPORT AND RECOMMENDATION

This matter is before the court on the pro se petition of Ray Charles Degraffenreid, a state prisoner, seeking habeas corpus relief pursuant to 28 U.S.C. § 2254. In accord with Title 28, United States Code, Section 636(b)(1)(B), and the order of the Honorable Charles E. Simons, Jr., United States District Judge, this petition for relief is before the undersigned United States Magistrate for findings of facts and recommendations to the district court.

Ray Charles Degraffenreid was convicted[1] with a codefendant of murder and was sentenced to life imprisonment. He appealed that conviction to the South Carolina Supreme Court which affirmed the judgment on January 15, 1979. State v.

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[1] The petitioner was tried twice. The first trial resulted in a hung jury after the trial court excluded a confession given by the petitioner. However, at the second trial, the confession was not suppressed, and the petitioner was convicted.

Degraffenreid, Memo Op. No. 79-10. Subsequently, the petitioner sought post-conviction relief in the state court, and an evidentiary hearing was held on April 28, 1981. The petitioner was present and represented by court appointed counsel. Finally on July 6, 1981, the presiding South Carolina Circuit Judge issued an order denying the petitioner's application for post-conviction relief. That decision was appealed in a timely manner to the South Carolina Supreme Court which affirmed the denial of post-conviction relief pursuant to Rule 23 of the Rules of Practice of the South Carolina Supreme Court. Degraffenreid v. State, Memo Op. No. 82-MO-237, filed August 3, 1982.

The present petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 was filed in this court on December 17, 1985. The respondents answered on January 29, 1986, and moved for summary judgment. In support of the summary judgment motion, the respondents filed the following documents: (1) Transcript of the record including the trial transcript, application for post-conviction relief, return to application, post-conviction relief transcript and post-conviction relief order. (2) Brief from direct appeal. (3) Brief of petitioner from post-conviction relief appeal. (4) Records of the Chester County Clerk of Court's Office regarding the subject conviction. (5) Petitioner's records from the South Carolina Department of Corrections. The petitioner was given an explanation of summary judgment procedure and copy of pertinent extracts from Rules 12 and 56 of the Federal Rules of Civil Procedure on February 11,

R.R. #2

1986. Thereafter, the petitioner filed a supporting affidavit, and on May 7, 1986, the respondents filed an amended return and motion for summary judgment accompanied by supplemental trial transcript pages. Finally at the direction of the Honorable Charles E. Simons, Jr., United States District Judge, an evidentiary hearing was held on February 19, 1987, at which the petitioner was present and represented by court appointed counsel, John Hardaway, Esquire.

The petitioner herein alleges that his conviction should be set aside for the following reasons:

(1) The petitioner's conviction was obtained by the use of a coerced confession, and

(2) The petitioner was denied effective assistance of counsel.

The respondents stipulate that the petitioner has exhausted state remedies available to him under the statutes and procedural rules of the State of South Carolina including his right of appeal from the judgment of conviction and from the denial of post-conviction relief. However, they allege that the petitioner has waived his right to habeas corpus relief by not fully raising the issues in any South Carolina court of review. Cole v. Stevenson, 620 F.2d 1055 (4th Cir. 1980).

R.4C. #3

The petitioner alleges herein that he was taken into custody, held incommunicado, questioned, administered a lie detector test, and as a result involuntarily confessed to the murder. The record before the court indicates that this issue

was presented to the South Carolina Supreme Court by the petitioner on direct appeal from his conviction. The questions presented to the Supreme Court at that time are as follow:

> 1. Did the court err in failing to suppress the admission of the statement taken by the police from appellant on February 3, 1977, while in custody, under mental duress, suffering from physical pain caused by hemorrhoid condition and after the police failed to provide appellant with his medication upon request?
>
> 2. Did the court err in failing to suppress the admission of the statement taken by the police from appellant on February 3, 1977, after appellant had requested an attorney?

The South Carolina Supreme Court dismissed these issues in a memorandum opinion finding no error of law present. Accordingly, it appears that the claim of an involuntary confession was fairly presented to the state courts.

FACTS

At the evidentiary hearing, the first witness to testify was John W. Hartley, an employee of the South Carolina Law Enforcement Division (hereafter SLED), who was a polygraph examiner in 1977. He brought with him the file on Ray Charles Degraffenreid indicating that on January 31, 1977, Ray Charles Degraffenreid was brought to SLED Headquarters in Columbia, South Carolina, where he underwent a polygraph examination. Prior to undergoing the examination, he was advised of his constitutional

RSC #4

rights, waived those rights and agreed to participate in the polygraph examination. The records made by Lt. Wyndham, a polygraph examiner now deceased, indicate that some of the petitioner's answers showed deception.

The witness testified that in the regular course, the petitioner would have been given the results of the polygraph examination as would the case agents. Subsequently, the agents would have incorporated those reports in his case report. The polygraph examination, with the machine running, lasted fifteen (15) to twenty (20) minutes, however, the pre-examination and post-examination questioning and interview probably lasted longer.

The next witness was Sheriff Robert H. Orr. He had been Sheriff of Chester County for twenty-five (25) days at the time of the events in question, but had been a state magistrate for ten (10) years, prior to the petitioner's arrest on January 29, 1977. He testified that in connection with an armed robbery investigation, the City of Chester Police Department had received information from one Smokey Harris about the 1973 unsolved Killiam murder case. Harris implicated Ray Charles Degraffenreid, and a warrant for Degraffenreid's arrest was obtained. Degraffenreid was arrested at the County Jail on Friday, January 29, ~~1977~~ 1977 (1978), and advised of his rights. Degraffenreid denied everything, indicated that he understood his rights, and did not ask for an attorney. He signed the waiver of rights form. (Respondent's Exhibit #2).

Orr testified that Degraffenreid did not appear to be in pain or have any problem walking or sitting. After fifteen (15) to twenty (20) minutes of questioning the petitioner, Orr placed him a youth cell which included a stool, bench, bed, shower, sink, and toilet. The door to the youth cell was a steel door with a small observation window, the only window in the cell. (See Respondent's Exhibit #3).

Orr indicated that city officers asked that Degraffenreid be separated from Harris and that he receive no telephone calls or visitors over the weekend. Accordingly, Sheriff Orr directed a notice be placed on the wall at the jail indicating that Degraffenreid was to receive no visitors, no telephone calls, and to be kept in the youth cell. (See Petitioner's Exhibit #1). It was Orr's intention that this sign would remain up over the weekend, but it was not removed until apparently February 4th or later. However, Orr testified that the petitioner never asked for an attorney, never asked to use the phone, never asked to speak with his family, and never asked for any medical attention. (See Respondent's Exhibit #4 and #5).

On February 3, 1977, Sheriff Orr saw Degraffenreid about 3:30 in the afternoon. He again gave the petitioner his Miranda warnings and explanation of rights, and the petitioner again indicated that he did not wish to have an attorney. Degraffenreid denied knowledge of the crime, but after approximately five (5) minutes of discussion, Degraffenreid volunteered to tell everything to Sheriff Orr and SLED Agent Long

who was present. At this time, he made an oral statement, and Sheriff Orr had a secretary at the jail transcribe the statement. (See Respondent's Exhibit #6).

Subsequently, although the petitioner had not asked for an attorney, the officers took him to the Clerk of Court for appointment of counsel. On February 4, the petitioner called his brother, who subsequently contacted Sheriff Orr saying that Degraffenreid had complained that he had been forced to sign a statement. Also on February 4, 1977, when officers began to question the petitioner again concerning the crime, he refused to talk saying that he wanted to see his attorney.

Finally, Orr testified that from January 29, 1977, until Degraffenreid was taken out of the youth cell sometime after February 4, 1977, he ate all his meals in the youth cell, showered in the youth cell, and left the youth cell only to be questioned in connection with the charges. Orr testified that the petitioner was taken to the Clerk of Court for appointment of counsel on February 4th because he was charged with murder and had given a statement. He indicated that although the City Recorder held court at the jail on Mondays, Wednesdays and Fridays, and a County Magistrate had an office at the jail, they were not qualified to set bond or appoint counsel in murder cases.

R&R. #7

Next, Reed Jerason Long, a SLED Agent, testified that on February 3, 1977, he was asked to talk to Degraffenreid with Sheriff Orr. Upon meeting Degraffenreid, Long advised the

petitioner of his rights, talked to him for about five (5) minutes, and then Degraffenreid confessed. He exhibited no pain, and made no complaints concerning the conditions of confinement or any denied request for an attorney. On February 11th, Long was asked by the petitioner and his attorney to look for an alibi witness, and on February 12th, Long was advised that the petitioner wished to withdraw his statement because he was scared, did not understand what he was doing, and had previously been denied a request to see an attorney. Finally, Long testified that he had been involved in investigating the Killiam murder in 1973, and in August, 1973, Degraffenreid and James Robert McClerkon had been taken to Columbia for a polygraph examination. McClerkon's examination showed that he had knowledge of the offense, but Degraffenreid's polygraph examination showed no knowledge.

Johnny Dawkins, the retired jailer of Chester County Sheriff's Department, testified that in 1977 he was in charge of the jail. His duties were to maintain the jail, to maintain a visitor's log and medical log, and to see that prisoners were cared for. He remembered the petitioner and indicated that had the petitioner had any medication with him, it would have been kept in a medical cabinet and a log kept as to its distribution. He indicated that if an inmate asked for court appointed counsel, then he would take the inmate to the courthouse for appointment of counsel. He had no recollection of the petitioner ever requesting an attorney. Similarly, he did not recall the

petitioner's complaining of pain, requesting medication, or making other complaints. He described the youth cell as dark with limited facilities. There were no radios, televisions, books or magazines, and a person in the youth cell was generally kept there for twenty-four (24) hours a day unless a special need required them to be taken out. He indicated that he would not have taken the petitioner out of the youth cell on his own, and referring to petitioner's Exhibit #1, the note ordering no visitors, phone calls, and so forth, he indicated that the order meant what it said. Finally, however, he indicated that the general practice of the jail was to let an attorney or minister see an inmate at any time. Visiting hours, however, were from 1:00 to 2:00 on Sundays and Wednesdays.

William Lawrence Straight, Chief of Police of the City of Chester, testified that on January 31, 1977, he took the petitioner to Columbia for a polygraph examination. He indicated that no interrogation was done going to or returning from the polygraph examination. Chief Straight testified that he witnessed the confession on February 3, 1977, (Respondents Exhibit # 6), and that the petitioner did not appear to be in pain and made no request for medication or an attorney. He also indicated that the petitioner never complained of the conditions of his confinement. On February 5, 1977, he gave the petitioner's attorney a copy of the statement, and on February 12, 1977, petitioner's attorney indicated that the petitioner

wanted to withdraw his statement and change his plea to not guilty.

Barbara Griffith, a secretary for both the Solicitor and the Magistrate for Chester County in 1977, testified that in February, 1977, she took the statement of the petitioner by shorthand, typed it up, and had him sign it. She was uncertain as to whether he actually re-read the statement himself or whether she read it to him.

William Edward Heath, a Detective at the Chester City Police Department, testified that he investigated the 1973 Killiam murder and in January, 1977, heard a confession from Smokey Harris which implicated the petitioner. Subsequently, at the direction of his superiors, he signed a complaint and obtained an arrest warrant for the petitioner. The warrant was given to Sheriff Cox who served it on the petitioner. He noted that the petitioner signed his waiver of rights form and signed the acceptance of the warrant.

Heath further testified that on January 30, 1977, he was called to the jail to see the petitioner. The petitioner asked Heath to check out an alibi witness, but made no request for an attorney, medication, visitors, telephone calls, or any change in the conditions of his confinement. Heath indicated that he volunteered to contact the petitioner's mother, but that offer was rejected. Heath indicated that he believed the petitioner and his family were not on good terms at that time. Again on January 31, 1977, Heath was asked to check out an alibi

RSR #10

witness. Neither alibi witness supported the petitioner's statements, and on February 3, 1977, Heath was advised that the petitioner had signed a confession. He was confused as to whether he had seen the petitioner earlier in the morning on February 3, 1977, and could not recall whether the petitioner had asked for an attorney at that time.

George Mayfield, the petitioner's brother, testified that he had visited his brother on a regular basis while his brother was in the stockade in Chester County, and knew that the petitioner was to be released on Friday, January 29, 1977. When the petitioner was not released on January 29th, he called the jail on Saturday, January 30th, and was told he would need to talk to the Sheriff. On Sunday, he went to the jail during visiting hours, but was not allowed to see his brother. On Monday, he tried to see the Sheriff, but was turned away. On Tuesday, he was advised the Sheriff was in conference. On Wednesday, he called the jail and, on Thursday, he was advised to speak to his brother's attorney. Friday, he received a call from his brother and was advised of the charges and that a statement had been signed. On Saturday, he talked to his brother's lawyer and, on Sunday, he was finally allowed to visit his brother. Subsequently, he sold his brother's car and added some of his own money to the funds to hire a private attorney.

R.C.C. #11

Ray Charles Degraffenreid testified last. He indicated he now resides at Kirkland Correctional Institution, but grew up in Chester, South Carolina. He was promoted to the tenth (10th)

grade in public schools and dropped out. He worked at jobs as a painter and a carder in the textile mills.

He was born on June 27, 1955, and at the time of the killing for which he was convicted, he was seventeen (17) years old.

He testified that in 1973, he was questioned by SLED Agent Long and Willie Heath in the Chester Jail. He was taken to Columbia for a polygraph examination, but never charged with anything. In 1977, he was finishing a rentence for purse snatching when he was moved from the Chester County stockade to the Chester County Jail. He testified that the stockade was composed of a dormitory of cells, and while in the stockade, he worked on something like a chain gang.

On January 29, 1977, Degraffenreid was moved from the stockade to the jail and taken to the Sheriff's Office for questioning. Sheriff Orr read the arrest warrant to him and had him sign it. He testified that he never read the advice of rights warning, but signed it. He testified that he told the police officers that he did not wish to sign a waiver because it might lead to a confession, but was advised that they could not talk to him unless he signed a waiver. After thirty (30) or forty (40) minutes of questioning, he was placed in the youth cell.

R4C. #12

He described the cell as being eight (8') feet wide by eighteen (18') or twenty (20') feet long with a shower, toilet, table, shelf, steel door with an observation window, and one (1)

light. He said there was no television, radio, books, or magazines. He remained in the youth cell from Saturday afternoon until Sunday afternoon when Willie Heath took him out of the youth cell for questioning. Heath questioned him for about two (2) hours, and Degraffenreid estimated that it was 11:00 o'clock at night when he was placed back in the youth cell. The next day, Monday, Heath questioned the petitioner at 9:00 or 9:30 in the morning and advised him that they had a witness who would testify against him. This questioning lasted for two (2) hours or more, but he was not placed back in the youth cell; instead he was taken to Columbia to have a polygraph examination. He was not questioned on the way to or from the polygraph examination and was not handcuffed. Once he returned to Chester, he was interrogated some more and was returned to the youth cell after supper. On Tuesday, three (3) officers questioned the petitioner in the Sheriff's Office for approximately two (2) hours. Again he was told that they had a witness against him and that Harris had given a statement. He was returned to the youth cell, and taken out later that afternoon when the same three (3) officers questioned him for two (2) or three (3) hours. The petitioner said he never asked for an attorney because he was still cooperating and did not think he needed one.

The petitioner also testified that during this period he was having pain with a hemorrhoid condition which he had

D&C #13

developed in 1976.[2] While in the stockade, he had received special meals, laxatives, and medication, but had not received any of this on the jail side. Eventually, he just quit eating. He indicated that at one time he asked the jailer for his medications, and the jailer indicated that he would look into it.

Tuesday night, Heath came to see the petitioner and questioned him in the Sheriff's Office some more. The petitioner said he asked Heath and the jailer to move him from the youth cell, and they both indicated that they would talk to the Sheriff about it.

The petitioner indicated that the youth cell was cold, and he could only sleep fully clothed and using two (2) blankets.

Sometime Wednesday night, the petitioner overheard a prisoner being given his rights. Accordingly, the next day when Heath appeared to question him, he asked Heath for an attorney. That afternoon, Officer Long and Sheriff Orr questioned him in the Sheriff's Office. The petitioner found the Sheriff's Office to be warmer, and he was continuing to have pain off and on because of his hemorrhoids. He did not ask for an attorney again because he had already asked for one. Finally, after being told repeatedly the gist of Harris' statement, he gave them an oral confession. He testified that he told them what they wanted to

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[2] Medical records submitted after the evidentiary hearing substantiate his claim of a hemorrhoid problem.

know in order to get an attorney and to get out of the youth cell. He indicated that he did not read his statement, and no one read it back to him; he simply signed it.

Immediately after giving the statement, the petitioner was taken to the Clerk of Court to have an attorney appointed, and was moved from the youth cell to the maximum security cell.

He was first able to use a telephone on Friday at which time he called his brother. The next day he saw a lawyer and got medications. Subsequently, he talked to his brother about retaining an attorney.

The petitioner admitted that he had a criminal record. In 1973, he was charged with armed robbery, was represented by a court appointed attorney, gave a statement and plead guilty. He also plead guilty at other times to grand larceny and housebreaking. He indicated that his release date from the stockade was February 5, 1977, but the practice at the stockade was to release everyone on the first day of the month. This meant he would have been released on February 1st. He generally denied understanding the various rights and, in particular, his right to remain silent. Also, he indicated that he had never turned down a request to talk to his mother and had good family relations. Finally, he testifed that during several of the questioning periods he had been confronted with Harris and that Sheriff Orr seemed to be enjoying the situation.

?SC. #15 The undisputed facts herein are that the petitioner gave a confession to law enforcement authorities after receiving

the warnings required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and after spending three (3) to five (5) days in solitary confinement. (January 29, 1977 to February 3, 1977).

The question here is whether the solitary confinement and custodial interrogation were sufficient to "cause the petitioner's will to be overborne and his capacity for self-determination to be critically impaired," Ferguson v. Boyd, 566 F.2d 873, 877 (4th Cir. 1977), and thereby making the confession involuntary. Such a determination must be made from consideration of a totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

In order to succeed in this court, the petitioner must present facts which would require exclusion on the basis of involuntariness. The state, on the other hand, has the burden of showing voluntariness.

Law enforcement witnesses repeatedly testified that the petitioner was advised of his constitutional rights in accord with Miranda on several occasions. This compliance with Miranda, however, does not dispose of the voluntariness issue. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Likewise although the state court made a determination of voluntariness, that determination is not a finding of fact deserving of the presumption of correctness under 28 U.S.C. § 2254(d). It is a legal question meriting independent

R.S.C. #16

consideration in a federal habeas corpus proceeding. Miller v. Fenton, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985).

In Darwin v. Connecticut, 391 U.S. 346, 88 S.Ct. 1488 at 1489, 20 L.Ed.2d 630 (1968), a confession was held to be involuntary where there was an inference that the petitioner was held incommunicado during which time a confession was obtained. In this instance, however, the court need not resort to inference. The facts are clear, undisputed and unambiguous. The petitioner was held incommunicado for three (3) to five (5) days in solitary confinement. He had no exercise, no visitors, no telephone calls. He ate, slept, bathed, and existed within this one cell. There were no magazines, radios, television, books or other diversions. The only window was an observation window in the cell door which when open revealed the hall and the door to the sheriff's office. The only time the petitioner was taken out of this reportedly cold cell was for questioning.

The only safeguard taken to protect the petitioner's rights was the giving of Miranda warnings. Despite the presence of judicial officers on the grounds of the facility and procedures for transporting prisoners to other court officials, the petitioner was not taken before a judicial officer, was not appointed an attorney and was not given any conditions of release until after he confessed.

"The current practice of incommunicado interrogation is at odds with one of our nations cherished principles--that the individual may not be compelled to incriminate himself. Unless

adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." Miranda v. Arizona, 384 U.S. at 459, 86 S.Ct. at 1619 (1966).

Despite sharp dissent recently over the extent to which Fifth Amendment rights are protected by application of Miranda as written, the Supreme Court has expressly refused to embrace incommunicado questioning as "a societal goal of the highest order," Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135, 1147 n. 4, 89 L.Ed.2d 410 (1986). Here, unlike the evening of incommunicado questioning approved in Moran v. Burbine, Id., the days of incommunicado questioning and solitary confinement bring into question the voluntariness of the confession. A finding of voluntariness cannot be based solely on a finding that the petitioner was advised of his rights, and here there is nothing else to support a finding of voluntariness. On the other hand, a lack of voluntariness cannot be presumed simply from a period of incommunicado questioning. Here, however, the totality of the circumstances, including but not limited to the repeated advice of rights, the length of the incommunicado questioning, the intentional imposition of solitary conditions of confinement, the delay in taking the petitioner before a judicial officer and the conduct of law enforcement authorities immediately after obtaining the petitioner's confession supports the conclusion that the confession was not the product of a free and deliberate choice rather than intimidation, coercion or deception. See

R&R. #18

North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). See also Gallegos v. Colorado, 370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962), Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801 (1949) (lengthy incommunicado questioning violates due process). Indeed the inference is that despite the advice of rights, the only way the petitioner was going to be released from solitary confinement and allowed contact with third parties was to give a confession. The undisputed facts are that as soon as he gave a confession he was released from solitary confinement and given counsel.

Likewise it cannot be said that the admission of the confession in this case was harmless beyond doubt in light of the mistrial when the confession was excluded originally.

Accordingly, finding less than a preponderance of evidence to support a finding of voluntariness, and the existence of facts which would require exclusion of the evidence, it is recommended that the petitioner's petition for habeas corpus relief be granted unless the state takes steps to re-try the petitioner within a reasonable period of time.

Respectfully submitted,

Robert S. Carr
United States Magistrate

Charleston, South Carolina
August 5, 1987

A TRUE COPY
Attest: Ann A. Lynch, Clerk
By: Kathy Dukes
Deputy Clerk

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NOTICE

1. This report containing recommendations will be filed by the Clerk of Court, and copies will be mailed to the petitioner and to the attorney for the respondents. Either party will have a period of ten (10) days in which to file with the Clerk any objections to the recommendations herein. After the time for filing objections expires, this case will be forwarded to the court for consideration of those recommendations, or any other matter presented for its decision in this case. Hemphill v. Melton, 551 F.2d (4th Cir., 1977), 28 U.S.C. § 636. Further, failure to file timely objections will result in a waiver of important rights and will bar appeal from a judgment of the district court adopting the findings in this report and recommendation. U.S.A. v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, ___ U.S. ___, 104 S.Ct. 2395 (1984).